Filed 1/28/10 In re A.L. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re A.L., a Person Coming Under the Juvenile Court Law.	B216911 (Los Angeles County Super. Ct. No. MJ17431)
THE PEOPLE, Plaintiff and Respondent, v. A.L., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Robin Kesler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Modified and, as so modified, affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

A.L., a minor, appeals from the order of wardship (Welf. & Inst. Code, § 602) entered following his admission that he committed second degree robbery (Pen. Code, § 211). A. was placed in the camp community placement program and then with the Department of Juvenile Justice, for a period not to exceed five years. A.'s sole contention on appeal is that the sustained petition cannot qualify as a serious or violent felony within the meaning of the Three Strikes law, and the juvenile court's contrary statements in the record should be stricken. Because the determination of whether the offense constitutes a strike is premature, we order the juvenile court's minute orders modified, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2008, A., along with a confederate, ordered a pizza. When the pizza delivery person arrived, A. and his confederate beat him with a hammer and robbed him.[1] A. was 15 years old at the time of the crime.

As part of a negotiated disposition, A. admitted committing the robbery.[2] The juvenile court sustained the petition and declared the crime was a felony. The juvenile court's minute order, dated July 28, 2008, stated that the "allegation is a [Welfare and Institutions Code] 707b . . . offense. The court finds that this is not a strike." The juvenile court ordered A. placed in the camp community placement program for a period not to exceed five years.

After A. violated several camp and probation conditions, he was placed with the Department of Juvenile Justice for a period not to exceed five years. The juvenile court also imposed a restitution fine. At the violation hearing, the juvenile court stated: "The offense is a Penal Code violation 211, a [Welfare and Institutions Code] 707(b) offense,

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1 As the evidentiary details surrounding the crime are not relevant to the issue presented on appeal, we do not recite them here.

2 Additional allegations that A. personally used a deadly weapon and inflicted great bodily injury on the victim were dismissed.

also a strike." The court's April 14, 2009 minute order likewise stated that the offense was a strike.

DISCUSSION

Correction of the record is appropriate.

A. complains that, because he was under 16 years of age when he committed the robbery, his conviction does not qualify as a "strike" within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). He urges that any references to the contrary should be stricken from the record.

A. is correct that, under current law, crimes committed by juveniles under the age of 16 do not qualify as "strikes." (See Pen. Code, § 667, subd. (d)(3)(A) [a prior juvenile adjudication constitutes a prior felony conviction for purposes of sentence enhancement if the juvenile was 16 years of age or older at the time he or she committed the prior offense]; *People v. Davis* (1997) 15 Cal.4th 1096, 1100; *In re Myresheia W.* (1998) 61 Cal.App.4th 734, 739.)

However, the question of whether A.'s robbery conviction does, or does not, constitute a strike is premature. *People v. Ybarra* (1988) 206 Cal.App.3d 546, 549, is instructive. There, the defendant was charged with driving under the influence and causing bodily injury. He pleaded no contest to the felony drunk driving charge. At sentencing, and only for future reference, the superior court determined characterization of the crime as a serious felony was proper. (*Id.* at p. 548.) The appellate court struck the superior court's legal conclusion, reasoning that the issue had been "prematurely raised." (*Id.* at p. 549.) The court explained: "We do not decide the merit of this contention since, as noted above, the issue is prematurely raised. Neither should the trial court have decided it. The complaint before the court did not allege defendant had suffered a prior serious felony conviction. Accordingly, the instant conviction could only affect defendant if he were to suffer conviction of a 'serious felony' in the future. A decision as to whether or not the present offense qualified as a serious felony would at most constitute an advisory opinion relating to the hypothetical use of the current felony conviction to enhance punishment for a future offense. Such a ruling would violate the

well-settled rule that courts should 'avoid advisory opinions on abstract propositions of law. [Citations.]' [Citation.] . . . [W]hether any future prosecution for a serious felony will occur, and if so, whether the instant conviction will then qualify to enhance the future sentence is entirely speculative. [¶] As are all statutory provisions, the recidivist statutes at issue here are subject to amendment or repeal by the Legislature. What effect the underlying conviction and related facts might have on future punishment would depend, among other things, on legislation in effect at the time of the new offense. [¶] Further, the eventuality of an enhanced penalty would not be directly attributable to the crime now before us. . . . ' "[I]ncreased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident to the *subsequent offense* rather than constituting a penalty for the prior offense." [Citation.]' " (*Ibid*.) Accordingly, *Ybarra* concluded that determination of whether the underlying offense constituted a serious felony should be "left to a future case in which the issue is fully justiciable." (*Id.* at p. 550.) *Ybarra* ordered the judgment modified to strike the trial court's legal conclusion characterizing the offense as a serious felony. (*Ibid.*; see generally *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540; *People v. Johnson* (2006) 142 Cal.App.4th 776, 789, fn. 4 [the " 'ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions' "].)

A., a juvenile, has not been sentenced pursuant to the Three Strikes law. The question of whether the robbery will, at some future date, qualify as a strike is entirely speculative. A. may not reoffend, the prosecutor in a future action may decline to allege the robbery as a strike, or the relevant statutes may be amended by the Legislature. Because the robbery conviction is not presently the basis for a Three Strikes sentence, the issue of whether it constitutes a strike prior is premature, and should not have been decided by the juvenile court. Accordingly, we order the record modified.

DISPOSITION

The minute orders dated July 28, 2008 and April 14, 2009 are ordered modified to strike the juvenile court's characterization of the robbery as a "not a strike" and " a strike," respectively. As so modified, the judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.